***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

74-1351

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NO: 74-1351

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IN THE MATTER OF

JACK ROBINSON,

BANKRUPT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK AT BANKRUPTCY NO. 71-376

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# BRIEF ON BEHALF OF RESPONDENT-APPELLANT, JACK ROBINSON

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SAPERSTON, WILTSE, DAY & WILSON
Attorneys for Appellant, Jack Robinson

(Donald P. Sheldon, Esq.
and
Thomas F. Segalla, Esq.,
of Counsel)

815 Liberty Bank Building
Buffalo, New York 14202

856-5400

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## PRELIMINARY STATEMENT

This is an Appeal from the Decision and Order of the Hon. John T. Curtin, Judge of the United States District Court for the Western District of New York.

# BRIEF ON BEHALF OF RESPONDENT-APPELLANT JACK ROBINSON

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

1. Did the Petitioner-Appellee, Manufacturers & Traders Trust Company, timely file objections to discharge of the Respondent-Appellant, Jack Robinson, Bankrupt, and its application to determine the dischargeability of its debt, as provided in section 17c(2) of the Bankruptcy Act.

2. Did the Respondent-Appellant, Jack Robinson, Bankrupt, commit an offense punishable by imprisonment as provided under title 18, United States Code section 152, and therefore, prevent his discharge.

## STATEMENT OF THE CASE

The Respondent-Appellant, Jack Robinson, the Bankrupt herein (hereinafter referred to as the "Appellant"), filed his Petition in Bankruptcy in the United States District Court for the Western District of New York on March 3, 1971 ( 3 )*.

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* References are to pages of the Appendix to the Brief.

Said Appellant was, at the time of the filing of the said Petition in Bankruptcy, a commissioned salesman, selling canned meats, who had very little formal education in the United States, having been brought up in the concentration camps of Europe prior to and during World War II. The Schedules of the Bankrupt showed that he had liabilities of $109,640.06 and assets of approximately $800.00 (6-18).

A notice of the First Meeting of the Creditors and notice of Order fixing the time for filing objections to discharge and applications to determine the dischargeability of debts, dated the 22nd day of March, 1971, sets forth that the said First Meeting of Creditors will be held on April 7, 1971, and the last day for filing objections to the discharge or applications regarding the dischargeability of certain obligations was June 8, 1971.

At the First Meeting of Creditors a request was made for further examination of the Bankrupt, which said examination was held on April 16, 1971 (41).

Thereafter, and on the 8th day of June, 1971, the Manufacturers & Traders Trust Company, the Petitioner-Appellee herein (hereinafter referred to as "Appellee"), filed objections to the discharge of the Bankrupt Appellant under section 14 of the Bankruptcy Act, and a Petition for determination of dischargeability of its obligation under

section 17c(2) of the Bankruptcy Act, without payment of the required fees to the Clerk of the District Court or to the Clerk of the Bankruptcy Court.

Hearings on the said objections and application were held before the Hon. Beryl E. McGuire, Referee in Bankruptcy, on December 2, 1971 (163), December 21, 1971 (353), and December 23, 1971 (417). After extensions of time for filing of briefs and/or memorandums of law, the Referee handed down his Decision and Order, dated January 3, 1973 (512), stating the Appellee's first specification of objections to discharge, to wit: That the Appellant had committed an offense under 18 U.S.C., section 152, in that he had knowingly and fraudulently made a false oath in relation to this bankruptcy proceeding and denied the discharge of the Appellant herein.

However, the Referee, in denying the Appellant's discharge, relied on a conclusion that "truthful answers to these queries, of course, would have provided a foundation for the Appellee's seeking a determination of the dischargeability of its claim and were most material for that purpose" (515). On application to the Referee in Bankruptcy, for a reconsideration based on an obvious misunderstanding by the said Referee as to the facts, bringing rise to the erroneous conclusion, an Order was entered granting the Appellant's

Petition for reconsideration.

In opposition to the Petition for reconsideration, the attorney for the Appellee set forth conclusions which could not be drawn from the testimony of the Bankrupt at the hearings in December, 1971 (163, 353, 417), or at the adjourned First Meeting in April, 1971 (41), or from the facts described in the testimony of the Bank officers in December, 1971 (163, 353, 417). Yet, on March 6, 1973, the Referee in Bankruptcy handed down his Decision and Order sustaining the objections to the Bankrupt's discharge and denying the said discharge, setting forth in the Decision the unsupported conclusions presented by the Bank's counsel in his affidavit in opposition to the Petition for reconsideration (518).

Thereafter, on the 14th day of March, 1973, the Appellant, the Bankrupt herein, filed his Petition for review with the necessary payment of the $10.00 filing fee with the United States District Court for the Western District of New York. Upon consideration of the Record the Hon. John T. Curtin, Judge of the United States District Court of the Western District of New York affirmed the findings of fact and the decision of the Referee (521). This is an appeal from that Decision and Order.

## ARGUMENTS

### POINT I

**THE APPELLEE FAILED TO TIMELY FILE OBJECTIONS TO DISCHARGE OF THE BANKRUPT AND ITS APPLICATION TO DETERMINE THE DISCHARGEABILITY OF ITS DEBT, AS PROVIDED IN SECTION 17c(2) OF THE BANKRUPTCY ACT, AND THE PROCEEDING SHOULD HAVE BEEN DISMISSED.**

Subsequent to the filing of the Petition in Bankruptcy on March 3, 1973, the notice of the First Meeting of Creditors and the notice of order fixing time for filing objections to discharge and applications to determine the dischargeability of debts was forwarded to each creditor listed in the Bankrupt's Schedules ( 6 ) and provided in part:

> "NOTICE IS ALSO HEREBY GIVEN that on the 22nd day of March, 1971, an Order was made in the above-entitled proceeding, fixing the 8th day of June, 1971, as the last day for the filing of objections to the discharge of the Bankrupt and for the filing of applications, as provided in section 17c(2) of the Bankruptcy Act, to determine the dischargeability of debts claimed to be non-dischargeable, pursuant to Clauses (2), (4) or (8) of section 17a of the Bankruptcy Act."

The Appellee herein filed its objections to discharge and petition for determination of dischargeability with the Office of the Referee in Bankruptcy on June 8, 1971, the last day to file said applications ( 20). However, said creditor failed to pay the required filing fee of TEN DOLLARS ($10.00) in each

of the instances, to wit: The objections to discharge, and the application for determination of dischargeability under section 17c(2).

It is provided in section 40c(3) of the Bankruptcy Act that:

> "Charges for the expense of special services relating to or in connection with proceedings before Referees shall be made and collected by the Referees in accordance with regulations to be prescribed by the Director, with the approval of the conference,..."

The scheduled special charges to be made under the said section of the Bankruptcy Act for deposit to the Referees' Salary and Expense Fund include:

> "9. For each application for determination of non-dischargeability of debts filed by creditors, a fee of $10.00."

Said Schedule also includes:

> "2. For each set of objections filed to a discharge ..., $10.00 to be paid by the objecting creditor ..."

In reviewing the language of the Schedule of special charges, it is clear that upon the filing of any application or petition, whether on objections to discharge, objections to a confirmation of an arrangement or plan, petitions for reclamation of property, or for petitions for leave to foreclose a mortgage, a filing fee must be paid at the time of

the filing by the petitioner. The Act requires the sums for the Referees' Salary and Expense Fund to be deposited when the petition is filed. What happens afterwards is of no concern, and the statutory requirement is not predicated upon a condition subsequent that a Referee renders services. This is the only tenable basis upon which a self-supporting salary system could be erected. 2 Collier, 14th Ed. §40.03.

Further, section 14 of the Bankruptcy Act now clearly indicates that:

> "Upon the expiration of the time fixed in the Order for filing objections or of any extension of such time granted by the Court, the Court shall discharge the Bankrupt if no objection has been filed, and if the filing fees required to be paid by this Act have been paid in full;" section 14b(2).

The language in section 14b of the Bankruptcy Act made clear that the limitation on discharge was intended to the effect that same would be granted only if the fees had been paid. The importance of the payment of fees, and the practice from the inception of a bankruptcy proceeding until its termination further signifies that you must proceed with the payment of fees as same become due. United States v. Kras, 93 Sup. Ct. 631, 409 U.S.434, 34 L.Ed. 2d 626 (1973).

In the instant case, it had been argued at the time of the motion to dismiss that the Appellee should not be penalized by the error of the Clerk in the Office of the Referee in Bankruptcy in accepting the petition without the

requisite filing fees. Further, that upon request, the Appellee did pay said fees. However, there is no question that without an application for an extension of time the respective party could be prejudiced by failure to file on or before the last date fixed by a Court, of its application or petition. Certainly the Court on its own cannot accept a proof of claim in a bankruptcy proceeding where same is filed after the last date is fixed on the notice to creditors.

Further, the Petition in Bankruptcy, itself, could not be filed without payment of the fees, or an application as a pauper with an installment agreement to pay said fees. In other Courts, judgments would not be entered without payment of fees, deeds would not be recorded without presentation of the requisite recording fees, even though the failure to pay the necessary fees could prejudice the party attempting to file the documents. This situation should be no different.

If it is the Court's error in accepting the Petition without the payment of the requisite filing fees, the argument that the Appellee would be prejudiced is not a valid one, as by accepting the Petition without the fee the Appellant is prejudiced.

It should be noted that if the Court can justify the acceptance of the Petition without the fee as its error,

then the Appellant could claim that the Order of Discharge of the Bankrupt, dated October 21, 1971, included the obligations to the Appellee. It is the Appellant's position that although the issuance of the said Order may have been an error, the Referee cannot elect as to which error he will honor and which he will not. Certainly, it cannot be pleaded at this time that the Bank is a pauper within the definitions of the Bankruptcy Act and that said applications should have been accepted without payment of the fee.

It appears that while the Bankrupt is held to a strict measure of compliance with all the provisions of the Bankruptcy Act, that the creditor herein has been allowed to use the procedures of the Act without full compliance with the provisions therein.

Therefore, the Appellant's motion to dismiss on the failure to timely file the requisite objections and application should have been granted herein.

## POINT II

THE FINDINGS AND CONCLUSION THAT THE APPELLEE ESTABLISHED BY FAIR PREPONDERANCE OF THE EVIDENCE REASONABLE CAUSE TO BELIEVE THAT THE BANKRUPT KNOWINGLY AND FRAUDULENTLY GAVE FALSE TESTIMONY IN THIS PROCEEDING AND THAT TRUTHFUL ANSWERS TO CERTAIN QUERIES WERE MOST MATERIAL FOR THE PURPOSE OF PETITIONER'S SEEKING A DETERMINATION OF THE DISCHARGEABILITY OF ITS CLAIM, IS CLEARLY ERRONEOUS.

It is provided in section 14 of the Bankruptcy Act that:

> "c. The Court shall grant the discharge unless satisfied that the Bankrupt has (1) committed an offense punishable by imprisonment, as provided under Title 18, United States Code, Section 152;..."

The offense set forth in the objections to discharge filed by the Appellee refer to section 152, 18 U.S. Code, in that:

> "Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding;..." (20 ).

The objections to discharge at Paragraphs "4" and "5" (21-22 ) of same spell out two basic items which the Appellee claims provide false testimony. Said items are:

1. Whether the Bankrupt read and understood the alleged instruments he signed on December 12, 1969.

2. Whether the Bankrupt told officers of the petitioning Bank in January, 1971, that he had accounts receivable.

The transaction involving the first item indicated above was with ROBERT F. SPITZMILLER, JR., an Assistant Vice-President of the Appellant, who was the Manager of the branch office involved in December, 1969. The testimony, Items a through g of the objections (22, 23 ), are taken out of context and

are not continuous questions. Further, with respect to the answer to Item a, the objections specifically exclude the remaining portion of the answer, which indicated:

> "I came into the Bank and always got loans, and that was the first time we entered this kind of agreement. So he gave me all the papers to sign, which I did" (57).

The Appellee would have the Court believe that the Bankrupt was knowingly and fraudulently giving false testimony under oath in order to avoid certain potential liability. This would assume that the Appellant has sophisticated knowledge of the law, which is obviously wholly untrue, based on the education and experience of the Bankrupt.

A review of the testimony which makes up that portion of the claim referred to as Item 1 is wholly contradicted by MR. SPITZMILLER'S testimony.

MR. SPITZMILLER testified on December 2, 1971:

> "Q. Did he read the loan agreement at that time?
> A. I don't know whether he read the whole agreement. He went through it. Whether or not he read the entire agreement I couldn't tell you" (304).

Again, on December 21, 1971, the following testimony
384-
of MR. SPITZMILLER is relevant (385):

> "Q. Did he read the agreement at the time he executed them on December 12, 1969?
> A. He was given the documents, whether or not he read them, I don't know.
>
> Q. How long did he take before he signed them?
> A. A few minutes.

Q. Enough to read all of the documentation?
A. Certainly the first letter and most of the agreement and the financial statements, we discussed them. Probably he did not have enough time to read the whole of the security agreement. We did discuss the contents of each agreement.

Q. You discussed the contents? Would it be fair to say he didn't read them in their entirety?
A. Yes."

The second item, or series of questions, which are alleged to be false testimony, involves alleged conversations with certain officers of the Appellee, to wit: MR. GEORGE SHELDON and MR. ROBERT F. SPITZMILLER, JR., pertaining to accounts receivable. The objections specifically set forth numerous questions taken out of context from the testimony of the Appellant at the adjourned First Meeting of Creditors (99-110), and are items h through y in the objections to discharge (23-25). The questions involve meetings with the Appellant and the Appellee's officers in January, 1971, wherein supposedly the Appellant gave information to MR. SPITZMILLER of certain alleged accounts receivable. The testimony of MR. SHELDON and MR. SPITZMILLER are in conflict as to in fact when the accounts receivable list was given to MR. SPITZMILLER, whether the list was ever verified by calls to the customers from Appellee officers,

and whether the Appellant was ever really confronted with the accounts receivable list. Further, the memorandums which are part of the Appellee records set forth conflicting opinions.

Said questions basically dealt with whether or not the Appellant advised the officers of the Appellee in January, 1971, that in fact he had accounts receivable. It must be understood that no loan was granted to the Bankrupt in January, 1971, and there was no consideration to the Appellant given to the Appellee at said time. The last obligation which arose between the parties herein was in December, 1969, some 13 months before the happening involved herein.

As I have pointed out in the facts, and as the Bankrupt testified at the examination in April, 1971, and the hearings in December, 1971, the Appellant was never educated in the United States, having received his entire education in Europe prior to World War II. Further, the Appellant received no education after being incarcerated in a concentration camp prior to and during the Second World War.

The 11 questions posed to the Appellant, which is the basis for denying its discharge of over $100,000.00 in obligations, were questions posed as to whether specific accounts receivable were in being in January, 1971. As brought out on cross-examination of the Appellee's witnesses at the

hearings in December, 1971 ( 163, 353, 417 ), the Appellee's officers knew that there were no accounts receivable at that time.

Further, a review of the transcript of the testimony of April 16, 1971 (41), reveals that the Appellant did not clearly understand the questions posed which are the substance of the objections. The transcript of April 16, 1971, contains the following questions and answers by the Appellant (101):

"Q. And did you make that statement to him on that day? Did you tell MR. SPITZMILLER on January 11th that that account receivable was owing?

A. There was no accounts receivable.

Q. I understand that.

A. I told you that.

Q. And did you not tell MR. SPITZMILLER on that--

A. How could there be any outstanding when I just told you that there isn't any?"

The questions and answers above clearly indicate that the Appellant, on April 16, 1971, attempted to tell the truth and attempted to clarify any misunderstanding as to accounts receivable. However, counsel to the Appellee proceeded to attempt to confuse the Appellant, an uneducated person, by periodically presenting to him questions pertaining to specific accounts receivable and whether he advised MR. SPITZMILLER of the said fact.

MR. SHELDON, in his testimony of December 2, 1971,

indicated when questioned about checking the accounts receivable that (237):

> "At the meeting with MR. SPITZMILLER and myself prior to the meeting with MR. ROBINSON and his attorney, when MR. ROBINSON did not show up, MR. SPITZMILLER and I sat down and discussed the loan, and I believe made two or three calls at that time. I don't remember whether we made the calls directly to the company, or we asked either one of these officers of the Bank to make the calls for us to attempt to verify the accounts receivable."

MR. SHELDON continued his testimony by saying (238):

> "I don't believe we found any of them that we could verify."

Further, with respect to a verification and whether the Appellee knew that there were or were not accounts receivable, MR. SHELDON, said (239):

> "I am sorry, sir, but all I can tell you is that I knew there was a discrepancy."

It is obvious from a review of the entire testimony of MR. SHELDON that the Appellee was well aware that there were no accounts receivable at the times of the meetings in January, 1971. MR. SHELDON indicated that prior to the meeting of January 13, 1971, the Appellee knew that the Appellant did not have any accounts receivable (200).

The entire inconsistent testimony and records of the Appellee and its officers support a clear finding that the

Appellee has not met its burden with respect to these items pertaining to the questions on accounts receivable. The Referee in Bankruptcy would not admit into evidence the whole basis of the testimony, to wit: A small piece of paper in two or three different color inks and pencilled notations, undated and unsupported by any other proof.

The Appellant has consistently testified that he did business with these customers over and over again and that the list which the Bank officer allegedly had could have been prepared at any time. Rather than indicating that it was the Appellant who was attempting to conceal the true facts of his financial condition, it was the Appellee who knew the Appellant's financial condition and knew that it probably had an uncollectible obligation. At that point, the Appellee attempted, through its officers, and through its attorney, who MR. SPITZMILLER testified had given advice with respect to the preparation of the memorandum pertaining to accounts receivable, appearing in the Appellee's record, to substantiate facts sufficient to support a claim for conversion, fraud, or some other cause of action which would not extinguish the liability in a bankruptcy proceeding.

In response to the direct examination by counsel for the Appellee, MR. SPITZMILLER testified on December 2,

1971, that the reason for preparing the memorandum (Exhibit 3-A) on January 13, 1971, was:

> "Normally, we always prepare a memorandum for the file, but in this case I believe MR. SHELDON or yourself had suggested that I be very thorough in writing this one up" (309).

The word "yourself" in the quotation refers to MR. GARDNER, the Appellee's counsel.

Applying the aforesaid facts to the question of law presented herein, it is well established that in order to bar discharge, the false oath must not only have been made "knowingly and fraudulently", but must also have been made with respect to a subject matter "material to the bankruptcy proceedings", or with respect to legitimate subjects of inquiry therein.

In re Pioch, 235 F. 2d 903 (3d Cir. 1956) sets forth this well settled and established principle as follows:

> "To bar the Bankrupt's discharge, there must be an actual fraudulent attempt on the part of the Bankrupt to hinder, delay, or defraud his creditors and constructive intent is not sufficient; the reasons for denying a discharge to a Bankrupt must be real and substantial, not merely technical and conjectural; speculation cannot be substituted for proof, and the requirement is for probative facts capable of supporting, with reason, the conclusions of the trier of facts; ... The right to a discharge is statutory in Section 14 of the Bankruptcy Act must be construed strictly against the objecting creditor and liberally in favor of the Bankrupt ..." Id. at 905 . Emphasis added.

The false oath must have been knowingly and fraudulently made. Matter of Taub, 98 F.2d 81 (2d Cir. 1938). That is, the statement must contain matter which the Bankrupt knew to be false and he must have included them willfully with intent to defraud. Tancer v. Wales, 156 F.2d 627 (2d Cir. 1946).

In the case of In re Tancer, supra, the Court held that after facts showed that the Trustee in Bankruptcy, the principal creditor, and the creditor's attorney knew of an allegedly concealed contract, it could not be contended that the Bankrupt did not "knowingly and fraudulently" conceal property or make any false oath. Further, in Morris Plan Industrial Bank v. Henderson, 131 F.2d 975 (2d Cir. 1942), the Court said that a bankrupt does not commit an offense by making a false oath unless he swears to what he knows to be false. The Courts have treated the words "knowingly and fraudulently" as "synonymous with an intentional act in a matter material to the issue which is itself material." In re Steinberg, 143 F.2d 942 (2d Cir. 1944), 1A Collier, 14th Ed., §1425.

There is no testimony in Appellee's presentation that the Trustee found that there were accounts receivable or that there was inventory or merchandise in which the Appellee allegedly had a security interest. There was no

testimony presented by the Appellee and no evidence to support a finding that there were accounts receivable or inventory or merchandise at the time of the filing of the Petition in Bankruptcy, or within the few months prior thereto. As a matter of fact, it was acknowledged that at the time of the filing of the Petition in Bankruptcy there were no accounts receivable, and the Appellee was aware of the said fact. A conclusion is presented in Anno: Bankruptcy - Discharge - False Account, 59 A.L.R.2d 791 that the evidence must be conclusive to warrant that the offense was committed fraudulently and knowingly, even though testimony may be subject to criticism for evasiveness. The lack of value of the property omitted from schedules has tended to negate fraudulent intent. In re Taub, supra. Discharges have been allowed where assets are of small or no value and, obviously, in this particular situation the the assets which the Appellee is concerned with were not in being.

It is true that a discharge is a privilege granted the honest debtor and is not a right accorded to all bankrupts. In weighing the facts put forward in the contest over discharge, however, the Court should keep in mind the beneficial policy allowing the honest debtor to get a new start in business and life---and should construe section 14 strictly against the

objectors, within the statutory limits and liberally in favor of the Bankrupt. Re Tabibian, 289 F.2d 793 (2d Cir. 1961).

In reviewing the testimony with respect to the accounts receivable conversations, it is to be noted, as previously set forth, that the testimony of MR. SHELDON and MR. SPITZMILLER is in conflict, and the memorandum of the Appellee is in further conflict, and the basis of the entire testimony with respect to the Appellee's representation in this proceeding is based on a slip of paper which the Referee refused to admit into evidence. Thus, the only logical conclusion that can be reached here is that there is not any clear, convincing or satisfactory evidence to sustain the charge made by the Appellee herein.

Most importantly, it has been traditionally held that in order to bar discharge the false oath must have been made with respect to a matter material to the bankruptcy proceeding. See Anno: Bankruptcy - Discharge - False Account 59 A.L.R.2d 791 at 831. Further, in order to be material to the inquiry the false oath must be a relation to the estate of the bankrupt; or the mode of administering his estate; or the disposition he had made of his property Id. at 834. Matters which are trivial in nature as to have little effect upon the estate and upon creditors have been treated as immaterial. 1A Collier, 14th Ed. §1425.

In re Chamberlain, 180 F. 304 (D.C. N.D.N.Y. 1910) provides an interesting analysis and sets the tenor of the controlling principles in determining whether the matter is material to the bankruptcy proceeding. The factual posture of Chamberlain, supra concerned creditors of a bankrupt that claimed that they had been induced to extend credit by reason of the bankrupt's false representations as to his property. Further, the bankrupt had denied under oath during his examination in the course of the bankruptcy proceedings that he had ever made such statements. The court held that even if such testimony was false, it was immaterial to any issue or question in the bankruptcy proceeding and therefore was not ground for denying his discharge. In reaching this decision the court noted:

> "I am far from satisfied that Chamberlain was or is a strictly honest man or that he had dealt squarely and fairly with these creditors, but the grounds of refusing are discharge in bankruptcy and do not cover general dishonesty or unfair and sharp dealing with creditors, or oral misrepresentations made in obtaining property on credit, or even false oaths unless they relate to matters material to the bankruptcy proceedings." Id. at 309.

See Willougby v. Jameson, 103 F.2d 821 at 823 (8th Cir. 1938) and Mea v. United States, 235 F.2d 65 at 67 (10th Cir. 1956) citing Chamberlain, supra). Therefore, even if it were construed that the Appellant in fact falsely testified during the April 16, 1971 hearing, such misrepresentation would

fall within the Chamberlain court's interpretation, and not be considered material to the bankruptcy proceeding.

## CONCLUSION

The application of the Appellee for denial of the discharge of the Appellant, the Bankrupt herein, and the Petition for determination of dischargeability of the obligation of the MANUFACTURERS & TRADERS TRUST COMPANY, in the sum of approximately $35,000.00, should be dismissed for failure to timely file its Petition herein and with payment of the required filing fees. This is not discretionary, and there is no question of fact involved as to the date when the filing fees were paid, which was after the last date to file objections to discharge and petition for determination of dischargeability.

The Appellee has obviously taken the loss of approximately $35,000.00 by virtue of the filing of the Petition in Bankruptcy by the Appellant. However, this in and of itself does not allow the conclusion that the Appellant is a liar or that he had obtained the monies through false representations or a false financial statement. Of the approximately 120 pages of testimony on MR. ROBINSON'S examination at the adjourned First Meeting of Creditors on

April 16, 1971, the Appellee could only find approximately 20 answers which it included in its petition on objections to discharge. These matters have been clearly explained in this Memorandum. The Court must take into consideration all the inaccuracies, inconsistencies, and evasive tactics by the Appellee, its officers, and records, in determining the issues at hand.

The Appellee has failed to sustain the burden of proof upon a review of the testimony and records herein. The Appellant is entitled to his discharge in bankruptcy, as he has not committed any offense punishable by imprisonment, as provided under Title 18, United States Code, section 152.

It is submitted therefore that the Decisions and Order of the Hon. Beryl E. McGuire, Referee in Bankruptcy, dated January 3, 1973, and March 6, 1973, which were affirmed by the Decision and Order of the Hon. John T. Curtin are in error and that said Decisions and Order should be reversed and that the objections to discharge and the application for a determination of dischargeability of the obligation of the Appelle, MANUFACTURERS & TRADERS TRUST COMPANY, should be dismissed and/or denied, and that the Appellant, the Bankrupt herein, should be granted his discharge in this proceeding.

Respectfully submitted,

SAPERSTON, WILTSE, DAY & WILSON
Attorneys for Respondent-Appellant
Office and Post Office Address
815 Liberty Bank Building
Buffalo, New York 14202

Tel. No. 716-856-5400

Donald P. Sheldon, Esq.
and
Thomas F. Segalla, Esq.
of Counsel

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.



*Index No.* 74-1351

IN THE MATTER OF

JACK ROBINSON,

~~XXXX~~ ~~against~~

Bankrupt

~~XXXXX~~

~~Defendant~~

*AFFIDAVIT OF SERVICE BY MAIL*

*STATE OF NEW YORK, COUNTY OF* ERIE *ss.:*

*The undersigned being duly sworn, deposes and says:*

*Deponent is not a party to the action, is over 18 years of age and resides at* 201 Main Street, Hamburg, New York 14075

*That on* April 25, *19* 74 *deponent served the annexed* 2 copies of the brief on appeal and 1 copy of the appendix on appeal

*on* William H. Gardner
*attorney(s) for* the Respondent
*in this action at* 1800 One M & T Plaza, Buffalo, New York
*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

*Sworn to before me* this
25th day of April, 1974

Gertrude Tzetzo

GERTRUDE TZETZO
Notary Public, State of New York
Qualified in Erie County
My Commission Expires March 30, 1976

Carol L. Vara

The name signed must be printed beneath

Carol L. Vara

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.



*Index No.*

*Plaintiff*

*against*

*Defendant*

**ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL**

*STATE OF NEW YORK, COUNTY OF* ss.:

*The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for*

*That on* 19 *deponent served the annexed*

*on*
*attorney(s) for*
*in this action at*
*the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

*The undersigned affirms the foregoing statement to be true under the penalties of perjury.*

*Dated*

The name signed must be printed beneath

*Attorney a*